

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Criminal Action No.
		1:16-cr-10094-LTS
v.	:	
ROSS MCLELLAN,	:	
Defendant	:	

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

FINAL PRETRIAL CONFERENCE

Wednesday, May 30, 2018
2:01 p.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

Rachel M. Lopez, CRR
Official Court Reporter
raeufp@gmail.com

APPEARANCES

2 On behalf of the Plaintiff:

3 UNITED STATES ATTORNEY'S OFFICE - MASSACHUSETTS
4 BY: STEPHEN E. FRANK
5 John Joseph Moakley Courthouse
6 One Courthouse Way, Suite 9200
7 Boston, Massachusetts 02210
8 (617) 748-3244
9 stephen.frank@usdoj.gov

7
8 UNITED STATES DEPARTMENT OF JUSTICE
9 BY: WILLIAM JOHNSTON
10 1400 New York Avenue, Northwest
11 Washington, D.C. 20005
12 (202) 514-0687
13 william.johnston4@usdoj.gov

12 | On behalf of the Defendant:

13 MARTIN G. WEINBERG, P.C.
14 BY: MARTIN G. WEINBERG
15 20 Park Plaza
16 Suite 1000
17 Boston, Massachusetts 02116
18 (617) 227-3700
19 owlmch@att.net

17 LAW OFFICES OF ROBERT M. GOLDSTEIN
18 BY: ROBERT M. GOLDSTEIN
19 20 Park Plaza
20 Suite 1000
 Boston, Massachusetts 02116
 (617) 742-9015
 rmq@goldstein-lawfirm.com

PROCEEDINGS

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is May 30th, the case of United States v. McLellan, criminal action 16-10094, will now appear before this Court.

Counsel, please identify themselves for the record.

MR. FRANK: Stephen Frank and William Johnston for the United States. And with us at counsel table is Martina Kneifel, who is a paralegal for the Department of Justice.

THE COURT: Great. Welcome.

MR. WEINBERG: Martin Weinberg and Rob Goldstein on behalf of Ross McLellan, Your Honor.

MR. GOLDSTEIN: Good afternoon, Your Honor.

THE COURT: So first, to run through a couple of things, just to make sure we're on track for Monday. One -- we'll know better later in the week, but right now I anticipate we'll get jurors -- if it doesn't change, I anticipate we'll get jurors at 9:30. There's a reasonable chance of that.

I think, at the suggestion of Jim McAlear from the jury office, I'm going to change just the way I ask the questions, the order a little bit, not -- it doesn't affect

1 the way we went over the strikes, no effect on that. But I'm
2 going to -- the first question that I'm going to ask the
3 venire is the scheduling question. And I'll go through that.

4 So I'll ask everybody in the venire -- I'll do the
5 preliminary explanation of the case, but then instead of
6 first going through who the lawyers, and one by one, each
7 voir dire question that I'll go over with you in a minute,
8 I'm going to ask first the scheduling question, because it's
9 a three- to four-week case and because there are likely other
10 cases impaneling on Monday. I'll do that first, bring up to
11 sidebar anyone who has a scheduling issue that I need to
12 explore, and we'll talk about it.

13 I'll excuse whoever needs to be excused for
14 scheduling. Everybody left has the time to serve. And then
15 I can send those people down, and they can participate in
16 other shorter trials that might be impaneling after us on
17 Monday. So I'll do that. When I'm done with that, then I'll
18 ask all the other questions, and I'll bring them up to
19 sidebar.

20 So that may give you more contact with the jurors,
21 but -- and it should maybe speed the process a little bit.

22 MR. WEINBERG: Could I ask a few -- several
23 questions, just focused on the jury, Your Honor?

24 THE COURT: Yes.

25 MR. WEINBERG: One is, I would ask the Court to

1 consider not advising the jurors who have issues with the
2 schedule that there are other cases that they --

3 THE COURT: Oh. That I'm not going to say. I'm
4 telling you that as to why I'm doing it.

5 MR. WEINBERG: Because our challenge, of course, is
6 to get a cross-section on a case of three to four weeks.

7 THE COURT: Right. I'm just going to ask the
8 scheduling question about -- and then I'll talk to them about
9 scheduling. And then I will -- when I'm done, we'll release
10 those people who have scheduling -- who I've excused for
11 scheduling purposes, to go downstairs to the jury office.

12 MR. WEINBERG: Second, I'm wondering --

13 THE COURT: What I ordinarily would say to them is,
14 "Well, you know, we'll send you down there, there might be
15 another case for you to work on."

16 MR. WEINBERG: No objection to that.

17 Second, the jury list, is that going to be
18 available to both parties Friday? Or is that only made
19 available on Monday?

20 THE COURT: As far as I know, you only get it
21 Monday morning at 9:00. I've never really seen it before
22 then.

23 MR. WEINBERG: Okay. That is usually what happens.

24 THE COURT: Right.

25 MR. WEINBERG: And that's been the regular course.

1 And last, I would ask the Government, since they
2 have the capacity to check jurors, sometimes they do,
3 sometimes they don't, regarding whether any of them are on an
4 FBI database, I would only ask that if it's the intention of
5 the Government to do any kind of background check through
6 databases that are unavailable to the defense, that they be
7 required to share the information with us.

8 MR. FRANK: It's not our intention, Your Honor.
9 We're going to be in the courtroom with the Court, with
10 counsel. We're not going to be running data checks.

11 MR. WEINBERG: I accept that. Thank you.

12 THE COURT: Fine. Okay.

13 How long do you think you're each going to be with
14 your openings?

15 MR. FRANK: About 30 minutes with us, Your Honor.

16 MR. WEINBERG: Longer than that, 45 to 50 minutes,
17 Your Honor.

18 THE COURT: Okay. And ordinarily, after we pick
19 the jury, I would send them out to get settled in the jury
20 room, bring them back in -- either before they go out or when
21 they come back in, swear them in, and give them some
22 preliminary instructions.

23 Most of the preliminary instructions are -- you
24 will struggle not to sleep through. It is essentially what
25 is evidence, you know, the course of the trial. It's the

1 same -- it would be no different in this case than in any
2 other criminal case.

3 And then there's one part that I usually explain
4 the case a little bit. It's sometimes a bit more detailed
5 explanation than I would have given the venire, and it kind
6 of depends. So sometimes it might just be the same.

7 And I don't typically charge the elements of the --
8 I don't typically give them any more explanation than charged
9 with the -- I would say: The defendant is charged in Count 1
10 with conspiracy to violate laws of the United States, Count 2
11 with this, Count 3 with this, Count 4 with this, Count 5 with
12 this, Count 6 with this. The defendant denies the charges."

13 I might, depending on -- you know, give a little
14 bit -- like another sentence or two factual detail about the
15 nature of the -- you know, what's alleged in the indictment.
16 But I -- but I think about whether, especially in a longer
17 case, whether it's helpful to explain --

18 There are a lot of issues, by way of parenthetical,
19 that you've raised objections to the Government's --
20 disagreements to the jury instructions. I'm not planning on
21 resolving those before the preliminary instructions on
22 Monday. And anything I charge them on wouldn't resolve
23 those -- I'm not prepared to resolve some of those questions
24 now. I want to hear the evidence, and I would like to look
25 more carefully at your proposals and the law, and I might

1 want to hear from one or another of you or more. So it would
2 be at a pretty high plain.

3 But still I guess I'm asking you whether you want
4 me to do that and what you want me to say, or whether you
5 don't want me to do it.

6 MR. FRANK: Your Honor, we actually prepared a
7 proposal in light of Your Honor's comments yesterday asking
8 us for that, and I forgot to print it out. So it's being
9 printed right now, and we can hand it up to the Court.

10 THE COURT: Fine.

11 MR. FRANK: It's a very, very short, high-level
12 overview of the indictment.

13 THE COURT: So you think that can be useful, both
14 to the venire, so they can answer the questions, and then I
15 can repeat it. Sometimes I use the same explanation, once to
16 the venire and once to the sworn jury.

17 MR. FRANK: I don't think it will hurt.

18 THE COURT: I think usually sometimes hearing
19 things twice is helpful. But you think --

20 And beyond that, you're not particularly looking
21 for me to precharge them, so to speak?

22 MR. FRANK: No, Your Honor.

23 MR. WEINBERG: We're not looking for a precharge,
24 but I would reserve a right to add a paragraph to Mr. Frank's
25 explanation of the case.

1 THE COURT: Sure.

2 MR. WEINBERG: We may have some disagreements.

3 THE COURT: Okay.

4 MR. FRANK: Here it is, actually, Judge.

5 THE COURT: All right.

6 MR. FRANK: Thank you.

7 THE COURT: (The Court reviews the document.)

8 MR. WEINBERG: Several observations here.

9 First, we would ask -- we would prepare, overnight,
10 Your Honor, and have for the Court tomorrow, whether we'd
11 have session or whether we'd submit it, an additional
12 paragraph that would include both Mr. McLellan's denial and
13 his assertion that he acted in good faith, and we would spell
14 that out in several sentences.

15 Two, I don't think that the Government needs to
16 both have an allegation of misleading clients, in
17 paragraph 2, and then a further allegation of misleading
18 clients in paragraph 3. And I think that can be combined
19 into a single sentence, since this is an overview that the
20 Court will be giving the jurors.

21 And lastly, I don't think there's any need at this
22 level for the Court to take this version on the
23 count-by-count analysis, unless this would be what the Court
24 would ordinarily say to the jury about the different charges.
25 I don't think it needs to be reiterated.

1 THE COURT: So I guess I would say, I have two
2 different statements in mind. They could be the same, they
3 could be different. One is to the jury -- I'm sorry, to the
4 venire. And I don't know that the venire needs a
5 count-by-count recitation, because what they need to know is
6 the gist of what's going on.

7 I think what I'm going to do is this. You should
8 draft --

9 What I would ordinarily do is have some version of
10 some -- for the venire, some version or subset of this of
11 what the Government's view was, subject to your comments, and
12 then some summary of what the defendant's is. And if you
13 want to say more than "denies the charges," that's fine. I'm
14 open to that. That's not limited.

15 What I'm -- my goal with the venire is something
16 that neither of you object to, the things that are said in
17 there, that it's fairly vanilla and that it gives them some
18 understanding of what the case is; so when I ask them
19 questions about, like, there's a cooperating witness, or you
20 have to follow the rules of law, or this and that, or do you
21 know about the securities industry, they have some context in
22 which to answer and it's not in a vacuum.

23 The second statement for the preliminary
24 instructions for the jury I think is a little bit helpful
25 just for me to -- like there I might give a little bit more

1 count by count, just because it's their first introduction to
2 the case. You'll be giving your opening statements and
3 perhaps referring to the individual counts, but it's a
4 beginning introduction to them of -- that there are several
5 counts. It's starting to focus them on the idea that there
6 are counts. They might not hear again after the first day
7 about counts until the last day. But it does introduce them
8 to that, so a little bit more detail is sometimes helpful
9 there.

10 And this level of detail, I mean, might be in that
11 zone. I probably wouldn't want to say more than this.

12 MR. FRANK: Your Honor, most of what Mr. Weinberg
13 says, subject to reading it, sounds reasonable to me. I
14 think where we might have an issue is detailing the defensive
15 or even getting into the issue of good faith, which is a
16 legal concept. It is -- it is -- you know, what we were
17 trying to do is simply pair it in plain English, the charges:
18 What is this case about.

19 I think it would be a good idea for the Court to
20 remind the jury that these are merely allegations; it's our
21 obligation to prove them beyond a reasonable doubt. The
22 defendant denies the allegations. But to then get into the
23 substance of what the defense is, is beyond what we had
24 considered sort of the purpose of doing this in the first
25 place.

1 THE COURT: So I guess it would depend as to what
2 you would want to say. I'm thinking that --

3 MR. WEINBERG: I'm going to say less than Mr. Frank
4 fears, but more than nothing.

5 THE COURT: I have no view until you submit it.

6 MR. WEINBERG: And I do think -- you know, I
7 understand the point that the Government's got the burden and
8 these are allegations, but I also think it's very important
9 that a jury hear, both in the opening from the Court and in
10 the openings, which is why mine might be a little longer than
11 Mr. Frank's, that there is a defense; that these allegations
12 are just allegations, and Mr. McLellan intends to represent
13 to this jury through the evidence of that. And it will be
14 short, it will be concise.

15 THE COURT: We'll look at it, and then we'll see.

16 MR. WEINBERG: Thank you.

17 THE COURT: That sounds good. If you can -- well,
18 okay. Submit it in writing for sure when it's done, and
19 maybe we're meeting tomorrow and maybe we're not.

20 All right. I think, as a practical matter, you can
21 anticipate doing openings on Tuesday. I was thinking about
22 that. But I think you probably all would prefer that. And
23 the scheduling -- I think realistically the earliest we'll be
24 done picking the jury is 11:30 or 12:00. The preliminary
25 instructions take a little bit of time. I hate to -- I don't

1 want to split the openings between lunch and coming back.
2 We'll go however long it takes Monday to pick the jury, and I
3 might do the preliminary instructions that I'm going to give
4 them, so then they can come in Tuesday morning at 9:00 a.m.,
5 opening for the Government. So we'll do that.

6 All right. That takes us to the -- what I'm -- in
7 jury selection, I have a general statement that I say to
8 jurors, just about the importance of jury service and the
9 Constitution. And then I'll explain to them briefly the
10 process that we're going to go through in terms of asking
11 them the questions and coming up to sidebar. And then I'll
12 read to them a description of the case, which I'll look at
13 what the Government has, what you have, and I'll -- what you
14 give me, and I'll put something together and read it to you
15 or issue it on ECF so you can read it, so you know
16 beforehand, if you have any great objection.

17 All right. So the first question that I'll ask is
18 the scheduling question. And we'll do that. And then I'll
19 come back with whoever is left, and I'll ask them the
20 following. Some of these questions, I'll -- if you want to
21 know the exact wording of the question, ask me. Otherwise,
22 I'm just telling you generally. Some I think you know what
23 they are.

24 Do you know the prosecutors in the case, and the
25 case agent? I'll have you stand, and I might have you

1 introduce yourselves or I might say your names. But probably
2 I would have you introduce yourselves. Same with -- I'll ask
3 them if they have ever worked for the US Attorney's Office or
4 the FBI. Same with defense counsel and Mr. McLellan.

5 I'd like a list -- maybe if you've given it to me
6 you have to remind me where it is in the docket, a list of
7 witnesses or other -- if there's somebody who's not a
8 witness, who you think -- or could be a witness, but might
9 not be a witness, who you think we should run the name by the
10 venire. And what I typically say is these are the witnesses
11 or other people you might hear a lot about. And then I'm
12 separately asking a question about the list of companies I
13 think you gave me, Mr. Frank. So I'll read that list to
14 them, and ask them if they know anybody.

15 And then I'll ask them about the following
16 entities: Aon Hewitt, AXA Equitable Life Insurance,
17 Inalytics, I-n-a-l-y-t-i-c-s, Kuwait Investment Authority,
18 Mercer, National Treasury Management Agency, Royal Mail,
19 Sainsbury's PLC, State Street Corp., Dutch Doctors Pension
20 Fund. I'll ask them if they or anyone in their families have
21 worked for them or for State Street or any of State Street's
22 related entities.

23 Have you ever been involved in a lawsuit, sort of
24 lawyers, US attorneys, those -- FBI, SEC, or the US Postal
25 Inspection Service.

1 Have they read or heard anything about
2 Mr. McLellan. Do you know anything about this case or him?
3 Have you heard or read anything about other securities fraud
4 cases or trials involving State Street? Do you know anything
5 about other securities fraud cases or trials involving State
6 Street? Do any of you have an interest in the case. Do any
7 of you know each other? I once had jurors who knew each
8 other.

9 Have you formed an opinion about the case from what
10 you've already heard? Have you expressed an opinion? Would
11 you tend to believe testimony of a law enforcement agent over
12 that of a civilian witness? Would you tend to give the
13 testimony of a witness for the Government, or evidence given
14 by the Government, more weight than defendant's evidence,
15 just because it's presented by the Government? So are you
16 aware of any bias or prejudice that might make it hard for
17 you to serve, or anything about the facts that might make it
18 difficult?

19 Have you, a family member, or a close friend ever
20 been the victim of a fraud? Same as to worked at a bank or
21 financial institution that has experienced or investigated
22 fraud committed against them.

23 You might hear testimony from a cooperator. The
24 law says you have to give greater scrutiny. Could you follow
25 that instruction?

1 He was an executive, Mr. McLellan, of a company
2 that manages transitions for large institutional investors.
3 Anything about this fact that would make it difficult for you
4 to serve as a fair and impartial juror?

5 Have you had any experience with securities or
6 banking industry professionals, or similar professionals,
7 that would make it difficult for you to serve as a fair and
8 impartial juror in this case?

9 Have you had any experience as an investor that
10 might make it difficult for you to serve as a fair and
11 impartial juror? Any.

12 Of you have any views about State Street, large
13 banks, large bank executives, Wall Street, or other
14 securities industry, generally, that might make it difficult
15 for you to serve as a fair and impartial juror in this case?

16 Have you, a family member, or a close friend ever
17 worked in the securities or banking industry, for example, as
18 a stockbroker at an investment bank? Same universe of people
19 have any associations or employment with the SEC, the CFTC,
20 FINRA, NASD, or New York Stock Exchange? Have you or any
21 member of your family or a close friend worked for any other
22 securities or regulatory agency, whether federal, state or
23 local?

24 Do you have any views about the regulation or
25 securities or banking industries that would make it difficult

1 for you to serve as fair and impartial?

2 Are you a members of a victim's right group, or has
3 anyone in your family ever been incarcerated?

4 I explain some legal principles and ask if they can
5 follow them. These are all the presumption of innocence,
6 only evidence that's presented in the courtroom, follow my
7 instruction whether or not you agree with them, can't discuss
8 the case among yourselves or with anyone else. The burden --
9 the presumption of innocence and the burden of proof
10 questions. Any philosophical or moral beliefs about sitting
11 in judgment? Don't think about punishment. Some law
12 enforcement questions.

13 Have you ever been employed by the FBI, marshals,
14 local/state police, and the like?

15 You'll hear testimony in this case from law
16 enforcement officers. The law requires you to weigh the
17 testimony the same as the testimony of any other witness.
18 Would you have any difficulty following that?

19 Have you ever had dealings with law enforcement,
20 whether favorable or unfavorable, which might influence your
21 consideration of this case?

22 Lawsuit of any kind against a law enforcement
23 officer or agency.

24 Have you ever been involved in a criminal case, a
25 victim, witness, lawyer and the like, serve as a juror?

1 Any other reason you can't serve? Hearing?
2 Disability?

3 Anything about that?

4 MR. WEINBERG: Just one area. I think Your Honor
5 covered it, but I wanted to be sure, which is whether or not
6 either they, family members, close friends work for or in the
7 past worked for State Street.

8 THE COURT: I have that. I've asked that. I will
9 be asking them: Have any of you, anybody in your family --
10 or do you want me to say close friend? -- ever worked for any
11 of the entities I just listed -- those are all those other
12 companies -- or for State Street or any of its related
13 evidence?

14 Do I need to include close friends?

15 MR. WEINBERG: I think so, because from two
16 perspectives. One is State Street is now being alleged by
17 the Government in Count 6 to be a victim, and I think they
18 intend to call a witness.

19 And second, even though they may not be witnesses
20 in specific, other than those that are named, you know,
21 through the testimony, there's going to be testimony about
22 certain executives, lawyers, compliance people that work for
23 State Street back in '10 and '11.

24 THE COURT: Fine.

25 MR. FRANK: Yeah. Just to clarify, we're not

1 alleging that State Street is a victim. We're alleging it's
2 an unindicted co-conspirator. But it is affected in the
3 sense of the statute.

4 Your Honor, just a very trivial point, it's AXA
5 Equitable and Aon Hewitt.

6 THE COURT: Aon Hewitt as in A-o-n. How do you --
7 what is the other one?

8 MR. FRANK: AXA Equitable.

9 THE COURT: AXA.

10 MR. FRANK: And I didn't hear -- I wasn't quite
11 sure I heard correctly, but the supermarket chain is
12 Sainsbury's.

13 THE COURT: Sainsbury's?

14 MR. FRANK: Yes.

15 THE COURT: I have that. I probably pronounced it
16 wrong.

17 Okay. That takes care of that. Okay.

18 So let me run through, first, a number of motions
19 that I don't think I really need to hear from you on. And
20 I'll likely memorialize this in writing -- not in a lengthy
21 writing, but in writing. And then there's some more
22 evidentiary motions that we can talk about. I'm happy to
23 talk about these if you really, really want to, but I've read
24 all the papers.

25 And so the Rule 15 depositions, the motion to Rule

1 15 depositions, I don't really think we need to talk about.

2 The jury questionnaire motion.

3 I think the motion to exclude, relating to alleged
4 concealment, is pretty clear. The -- which I'm likely to
5 deny the motion to exclude.

6 I'm likely to deny the motion to exclude the Dutch
7 pension fund transition.

8 I'm likely to deny the motion to sever. The --

9 I'm likely to deny the motion to preclude
10 individual investors from testifying.

11 I'm likely to deny the motion to exclude his
12 statements to the agents. Though I pause there. A concern I
13 have is -- and all I know about it is what's in the four
14 corners of those motions, is that I don't think it's fair for
15 there to be an expressed or implied inference that either,
16 (a), that he was interviewed because he was implicated in
17 whatever ConvergEx did or didn't do, or was -- and I don't
18 think you're going there, but I could see just that the FBI
19 interviews somebody, creates a specter for some people; or
20 second, that somehow, because he got interviewed, even if he
21 didn't do it, he's mixed up in it in some way. And so I
22 know, in a sense, you're not looking for those inferences,
23 you know --

24 MR. FRANK: They wouldn't even be true, Your Honor.
25 He was viewed as a potential victim.

1 THE COURT: Right. Okay. So to the extent that --
2 I'm likely to admit it. That said, when it comes along, if
3 you are -- would like a limited -- some sort of instruction
4 to explain that, like, he was -- you know, the FBI went to
5 talk to him because they thought he might be a victim or a
6 witness -- essentially an employee of a victim, right? And
7 they just went to him for informational purposes, that would
8 seem to dispel these other potential inferences. If you want
9 that, you could bring that up or we could talk about that. I
10 don't know if you want that or not.

11 MR. WEINBERG: Thank you, Your Honor.

1 about, I don't know, somebody who's adding a dollar to every
2 commission, you know, in every retail trade, you know, for
3 individual retail customers. It's like, okay, it's a
4 securities industry. But it seems -- so that -- so you can
5 ask.

6 MR. WEINBERG: Okay.

7 THE COURT: You can ask for anything and -- but
8 that's my general thought on that.

9 MR. WEINBERG: I understand.

10 THE COURT: And if you want the limiting
11 instruction, I think maybe the day before it's coming, or
12 something, propose something, and we'll look at it then. But
13 I would be thinking about something like that, because that
14 did cross my mind.

15 The motion to admit foreign deposition testimony,
16 I'm likely to wait on until I hear back. Maybe I was
17 successful yesterday in my -- as to paper.

18 Well, so that leaves a couple motions to talk
19 about. And maybe to keep it moving and guide it a little
20 bit, I'll give you a couple thoughts I had or just things I
21 was thinking about, and I'm happy to hear you.

22 One is that, as to a lot of the things that the
23 defendant, that the Government is seeking to strike that's in
24 the defense case, a lot of it just strikes me as I just have
25 to wait and see. In other words, I haven't heard the

1 evidence. I don't -- I know, in some ways, a fair bit about
2 this case. But this is a complicated case, and I don't know
3 every -- I don't know what all the theories are of the
4 Government or the defense. I'm going to know a lot more
5 about this case Tuesday at noon than I do now, and I'll know
6 more about it as I hear the witnesses.

7 So I can imagine ways in which some things might be
8 admissible, but I don't think it really will be admissible on
9 those grounds or not. I don't know what the issues will be.
10 And sometimes I just don't know really what this thing is
11 about, and I won't know until I hear the evidence and it's
12 offered. So in a big picture way, I'm not likely to rule on
13 all these things. That said, trying to be helpful, I'll give
14 you some thoughts.

15 With respect to the regulations -- I understand the
16 case to be an affirmative misrepresentation case by the
17 Government, that the Government is alleging Mr. McLellan
18 made -- that he or co-conspirators made statements that the
19 Government alleges were untrue, half true, or deceptive for
20 the -- with the intent and purpose of misleading the victims;
21 that to the extent that he should have said more, the
22 Government says the duty to say more arose out of what was
23 said, not out of any independent legal obligation to
24 disclose. So in that sense, it's not an omissions case and,
25 therefore, the Government is not saying some regulation said:

1 You had to say this.

2 That said, it may be that some regulation that says
3 you don't have to disclose certain kinds of things, if
4 there's sufficient similarity to the kinds of things that
5 weren't disclosed here, and if there's some connection to --
6 there's some evidentiary basis to infer that Mr. McLellan
7 knew about that regulation at the time -- at the time the
8 failure to disclose occurred -- not today, say -- it seems to
9 me the regulation, that regulation could be potentially
10 relevant and admissible, even though it's not an omissions
11 case. Because I could potentially see it bearing on good
12 faith and -- which I understand is sort of how it's being
13 advanced.

14 That said, I'm much more dubious that either --
15 that unpassed regulations in legislation has any particular
16 significance, as a general proposition. I think the reasons
17 why things are proposed and then don't get passed is purely
18 speculative as to sort of what it means, so I'm not sure you
19 can draw any inference out of it. I don't think you can even
20 necessarily draw the inference that it necessarily reverses
21 course. So I am much more skeptical.

22 I'm not ruling those things out right now, but I'm
23 much more skeptical of the admissibility of those. So that
24 sort of touches upon, I think, the motion that relates to the
25 Senate bill and the regulation.

1 MR. FRANK: May I inquire?

2 THE COURT: Yeah.

3 MR. FRANK: So Your Honor suggested that there
4 would need to be some evidentiary basis that the defendant
5 knew about the regulation. So that would be a burden on the
6 defense to enter that evidence before --

7 THE COURT: Burden on Mr. Weinberg to at least
8 point to me to some evidence before I'm likely to admit that.
9 And whether he has to produce the evidence or it comes out of
10 your evidence, I'm agnostic. But I think there has to be --
11 I don't think the regulation is just admissible on its own.
12 The only way I understand it might be argued about or -- so
13 far, unless somebody gives me another reason in the course of
14 the trial, I would think that if it's bearing on his state of
15 mind and his potential good faith or absence of intent, or
16 what have you, he'd need to know about it.

17 There are a myriad of ways one could make that
18 connection to him knowing about it, possibly -- I have no
19 idea.

20 MR. FRANK: The only additional concern I would
21 cite about showing the jury the actual document, Your Honor,
22 as opposed to having witnesses, for example, expert witnesses
23 testify as to the existence of the regulation, is that this
24 will then be the only statute that is physically put in front
25 of the jury. Not even the statutes with which he's charged

1 are physically put in front of the jury. So this single
2 statute --

3 First of all, the Court is the interpreter of the
4 law. But second of all, this single statute will all of a
5 sudden be there for the jury to view in absence of any other
6 statutes and takes on sort of inordinate importance and
7 suddenly turns them into interpreters of the law. If the
8 point is only that there is a statute that says commissions
9 need not be disclosed by riskless principals trading bonds,
10 assuming there's a reason to believe the defendant knew about
11 that statute, the existence of that statute can be discussed
12 through witness testimony, without actually putting the
13 physical document in front of the jury.

14 THE COURT: So I -- fair point. I'm not prepared
15 to resolve that now. I'm not so much -- I wasn't so much
16 speaking to the actual document, as to the content.

17 MR. FRANK: I understand.

18 THE COURT: And how the content might come in and
19 what it might be seems, itself, a question that we would
20 resolve at the trial when it came up.

21 You could think about that. It's a consideration.

22 MR. WEINBERG: The real test, Judge, and I think
23 you've put your finger on it -- and I understand Mr. Frank's
24 objection. It's not irrational. And perhaps we can work out
25 a stipulation that's simpler for the jury.

1 THE COURT: You might find it more effective for
2 you not to have them reading the statute, because it may be
3 fairly opaque to them.

4 MR. WEINBERG: Understood.

18 For instance, AXA was not ERISA protected. The
19 European clients were not ERISA protected. And then that
20 statement of Mr. McLellan's state of mind is clearly
21 admissible on his understanding, his knowledge, his good
22 faith, whether he was right or wrong.

23 You know, I don't know that we can't get farther,
24 if we focus on just what is the evidentiary basis for
25 Mr. McLellan's awareness of the framework that he was working

1 in, in nonERISA clients. But I do think a reliable,
2 contemporaneous statement that that was his state of mind is
3 sufficient.

4 THE COURT: So --

5 MR. WEINBERG: And that really goes to the case
6 that we gave Your Honor, the citation to -- which was the
7 court essentially saying --

8 THE COURT: I haven't -- I don't recall seeing that
9 statement in the briefing. So if -- you know, one end is
10 that he testifies and says, "I read it," right?

11 MR. WEINBERG: Yeah.

12 THE COURT: Plainly, at the relevant time. That's
13 good enough.

14 You could have an e-mail that sent it out. There's
15 one case one of you cited that someone took a training class.
16 I think the Government admitted evidence that the defendant
17 had taken a training class. And that might give rise to an
18 inference that they would have talked about this kind of
19 regulation and -- maybe. It depends on what I knew about
20 what the class was. But something --

21 So that one is -- you know, that's not as far
22 afield as what I'd say don't think would be persuasive, which
23 is the mere fact that he works in the industry and that it
24 might be a regulation that's relevant to his area of work in
25 the industry. It's a little bit more specific than that, but

1 it's still pretty --

2 MR. WEINBERG: Understood. And we'll provide --
3 before we reference any of the regulations that we've sought
4 to admit, we will certainly provide the Court with the
5 predicate and seek its admission based on that.

6 MR. FRANK: Okay. Is there more than one?

7 MR. WEINBERG: There's three or four -- there's
8 several regulations. And if you and I reach a stipulation, I
9 understand it's conditioned on the foundation that
10 Mr. McLellan had some, at least, general awareness. And I
11 would be prepared to make that proffer before I reference any
12 regulation or stipulation.

13 MR. FRANK: Okay. I just only remember one being
14 included in the exhibit, so that's why I'm asking.

15 THE COURT: You had a motion, Mr. Weinberg, to
16 admit one regulation and a Senate document. That's what I've
17 been speaking about. There was some reference in the
18 experts, it was unclear, to sort of changing rules and
19 regulations.

20 MR. WEINBERG: Yeah. I was thinking of the second
21 regulation, in fact, that was passed, as opposed to rejected,
22 just recently, which, for the first time, conferred
23 obligations on brokers to disclose riskless principal markups
24 to retail customers as contrasted to professional customers.
25 I think it's all the same framework, which there is no

1 prohibition, per se, absent ERISA or a fiduciary
2 relationship. There is no compulsion to disclose a markup,
3 other than --

4 THE COURT: So in the expert -- that makes me think
5 about the expert motion.

6 By the way, one question that I did want to ask
7 you, duration of trial.

8 MR. WEINBERG: Yes.

9 THE COURT: What's your estimate now?

10 MR. FRANK: We are still optimistic that we will be
11 done well under three weeks. That depends --

12 THE COURT: Both sides or just your side?

13 MR. FRANK: Our side. That completely depends
14 on -- I mean, certainly based on the length of our
15 anticipated direct examinations, it's easy. But it entirely
16 depends on the length of the --

17 THE COURT: Within three weeks is not only based on
18 your presentation, but what you reasonably might anticipate,
19 based on your experience as to what the cross would be.

20 MR. FRANK: It factors in cross, yes. I just --
21 you know, with two of the witnesses in particular, I have no
22 idea whether we're talking two hours or eight hours.

23 THE COURT: I'm guessing as to, if those two are
24 Mr. Pennings and Boomgaardt, not two hours. But I don't
25 know.

1 MR. WEINBERG: Yeah. I think more than two and
2 less than eight.

3 THE COURT: All right. And then how long do you
4 think you'll be?

5 MR. WEINBERG: If I -- if the defense goes to the
6 maximum, it will be less than a week. Five days, five days
7 maximum.

8 THE COURT: So I ask for two reasons. One is, I
9 want to tell -- in asking the jurors the schedule, I need to
10 tell them how long it will be. And so if we're starting on
11 June 4th and we're saying one, two -- you're saying you'll be
12 done before -- no later than and probably before June 22nd.

13 MR. FRANK: Yes, Your Honor. Is that the end of
14 the third week?

15 THE COURT: Yes.

16 MR. FRANK: Yes, Your Honor.

17 THE COURT: So the 4th, the 11th, and the 18th.

18 MR. FRANK: That's my hope.

19 THE COURT: All right. You say you'll be done
20 within a week.

21 MR. WEINBERG: Yes. We've scheduled some of the
22 non-US experts for the very end of the third week that
23 Mr. Frank just identified and the very beginning of the --

24 THE COURT: The reason that I asked this is, (a),
25 can I tell the jurors that they will get the case no later

1 than -- can I say no later than Thursday, June 28th? The
2 reason I -- here's the practical considerations.

3 One, I want to be able to tell the jurors when
4 they'll get the case, so that they can answer whether it's a
5 scheduling issue or not.

6 Two, my practice is to tell them you'll get it by a
7 certain date, and then I intend to give it to them by that
8 certain date. That's why I'm talking to you and looking to
9 you to give me that. But once I say that, I'm going to do my
10 best to -- I'm not saying I've never gone back on that to the
11 jurors, but I work really hard not to go back on that. I
12 want to say -- give them something that's realistic that we
13 can meet and -- so then promise them that they would get it
14 by that time, and I'll be --

15 I don't impose, on civil or criminal cases, time
16 limits, but I would be asking you a lot about the time,
17 keeping it moving. Do we need this? Can we keep it going,
18 and be -- where are we in terms of your estimate?

19 And so that's the reason I asked. It's like not a
20 fake number. It's for real.

21 And then the other consideration, the practical
22 matter you have is that, if you really go all of this time --
23 and the reason that I brought up Thursday, the 28th, is if
24 they got it on -- if you figure it's going to take the whole
25 morning to do closing arguments and charge -- or most of it,

1 right?

2 You're going to want at least 45 minutes for close?

3 MR. WEINBERG: Yes.

4 MR. FRANK: Absolutely.

5 THE COURT: Right. Plus, there's a number of
6 charges, and it's somewhat complicated. So let's just say 45
7 minutes for the charge, so an hour and a half, so by the
8 time -- it's 12:00 to 1 o'clock when you're done with all of
9 that in the morning. And assuming we're -- that means you're
10 done with the evidence on Wednesday the 27th. That gives
11 them one afternoon and the next day for deliberations.

12 The following week is 4th of July week. I'm happy
13 to be here. I think I'm going to be here, anyway. But a lot
14 of people take vacation then. And I think if -- I think
15 we'll -- one of the things that will come up in the
16 scheduling question is, what about Fourth of July week?

17 I'm open -- I guess what I would probably say to
18 the jurors, if they're not done by then, is that we're not
19 sitting -- they're not deliberating that week, or we're not
20 sitting that week, unless -- either, period, I would just
21 decide it. That's probably what I would do. Because I'd
22 worry that if there's one juror who doesn't want to, that it
23 will create division in the jury, if I give the decision to
24 them. If they're deliberating, I probably would leave it to
25 them to decide.

1 MR. WEINBERG: I can say to the Court that my
2 prediction of the defense is somewhere between three days
3 minimum and five days maximum. And I do think that in terms
4 of the Government's case, it will take less than three weeks.
5 There's going to be two extensive cross-examinations,
6 Pennings and Boomgaardt. I don't think that the rest of the
7 Government's case is going to generate very long crosses,
8 maybe one or two witnesses longer than others. But I tend to
9 try to be focused and precise and not wander and --

10 THE COURT: So you think, actually, even though
11 we're picking a jury Monday, open on Tuesday, and miss
12 one day with no trial, that they will be done before the
13 29th?

14 MR. WEINBERG: And I guess --

15 THE COURT: How long would it take you if you just
16 did direct, you didn't have any cross?

17 MR. FRANK: I haven't done the math, Your Honor,
18 but I will say that the Boomgaardt and Pennings direct are --

19 Mr. Johnston is saying five hours each. I think
20 they're shorter than that.

21 THE COURT: I like your thinking better than
22 Washington.

23 MR. FRANK: Bureaucrats.

24 And you know, there are recordings that take a fair
25 amount of time, but -- so that would be the outside number.

1 So that's eight to ten hours, call it, on direct.

2 THE COURT: So are you both comfortable, given what
3 you know about the case, if I tell the jurors on Monday that
4 they'll get the case by the end of the day, no later than
5 Thursday, June 28th?

6 MR. WEINBERG: I would say with the caveat, Judge,
7 that an unexpected -- and I wonder whether or not the jurors
8 could be asked, if there's unforeseen things, whether they
9 would be prepared to sit for an afternoon or two, in order to
10 get them the case, before the week that includes July 4th?

11 MR. FRANK: So that's an area where we have some
12 agreement, given the difficulties that we have in scheduling
13 witnesses who are coming from Europe. And there's a fair
14 number of them. We've made travel plans for them. But these
15 are voluntary witnesses, and they need to go back. They're
16 all pretty short witnesses.

17 THE COURT: So here's -- so what -- there's --
18 those are two different things. Yours is there comes up an
19 afternoon, like we're looking like we could get it on the
20 28th, but we need one or two afternoons in the last week, in
21 the last five or six days.

22 MR. WEINBERG: Yes.

23 THE COURT: My inclination of that is, later, if
24 that's what it is, is tell the jurors. They'll all be happy
25 with us that -- like this is the situation, it's taking

1 longer, the choice is the afternoon or not. We'll know
2 something about their afternoon schedules from the -- and at
3 that point, they'll be invested in the case. If it's just an
4 afternoon or two in the last three to seven trial days, I
5 think it's not a problem. I would prefer to avoid it, but
6 I've done that before, in one or two cases. And my
7 experience is the jurors get invested, and it's a better time
8 to ask them. Because we're only going to ask them if we
9 really need it for that.

10 I'm open to what you're suggesting, Mr. Frank,
11 because I hear you. You hate to have somebody who flew in
12 from Europe, and they're an hour on the witness stand and
13 they did 15 minutes, and now we're saying, "Well, let's sit
14 around for the afternoon, miss your plane." It costs
15 everybody a lot of money and dislocation, and come back
16 tomorrow for 20 minutes.

17 But I guess the question is, how often do you want
18 to do it, and do you know when you'd want to do it? Because
19 what happens, in my experience in picking the juries, is
20 there are some people who are able to serve if they know
21 they're going to leave at 1 o'clock every day. There are
22 some people who it doesn't matter. And there are some people
23 who, you know, maybe could accommodate. You might -- it
24 matters to them, sort of in picking, what that is. So I
25 guess the question is how often would I be telling them? I'm

1 open to it. I would hear why.

2 MR. FRANK: Well, my goal would be to avoid it.

3 But my only hope would be that, rather than telling them that
4 1 o'clock is a hard and fast --

5 THE COURT: Would I be able to tell them the day
6 before, or I wouldn't really know until the day of?

7 MR. FRANK: I think we probably have a good sense
8 the day before, because we would know who's here and how --
9 how far behind we are.

10 THE COURT: So what I might do -- and you could
11 remind me about this on Monday, if I forget -- is say to them
12 that the schedule is 9:00 to 1:00. It's really 9:00 to 1:00.
13 You'll really be done every day at 1 o'clock. Except there's
14 some witnesses from Europe in this case, and that we're -- we
15 hope to be able to do the whole thing 9:00 to 1:00, and
16 manage the schedules and the like. But it's possible that,
17 given the scheduling issues, we have somebody from Europe,
18 and we need to get them back. And so there could be -- on a
19 regular basis, there could be an occasional afternoon where
20 you might be asked to sit. But if you do, you'll know at
21 least the day before.

22 MR. FRANK: I think that would be fair, Your Honor.

23 THE COURT: Okay. Fine. All right. That takes
24 care of that.

25 So coming back to the experts. So I thought --

1 again, I'm not really prepared to rule on this definitively.
2 All I have is what you excerpted, Mr. Frank. I haven't read
3 the reports. I don't know how much of the reports you
4 actually intend to elicit in the form of testimony or whether
5 the report is more expansive and protected.

6 I'll say a couple of things that I think might be
7 helpful to guide you. One is, to the extent that they're
8 talking about -- I assume both of the -- the following
9 assumes that they're experts in the field. Assuming they're
10 experts in the field and they want to say that -- reading,
11 say the contracts at issue, this is how -- if they're trying
12 to say this is what the contracts mean? No. That's law.
13 They don't get to say that.

14 But if they want to say this is how people in the
15 industry understand these terms, without regard to whether
16 that's right or wrong, just this is how -- this is either
17 what this term generally means to people in this industry and
18 based on my experience and expertise, I think that's fair.

19 And to the extent there's a legal interpretation
20 about the term, I will either then give a limiting
21 instruction: Look, there's a legal meaning to the contract.
22 That comes from me. He's not telling you the legal meaning,
23 he's telling you his view of the way people in the industry
24 just think about.

25 So that -- I'm open to hearing you, if you think

1 that's not a proper line to draw. But I'm inclined to be
2 open to that.

3 MR. JOHNSTON: Your Honor, as we stated in our
4 motion to limit the testimony, we think it's fine to have an
5 expert testify about a particular term. But I think going
6 beyond that and starting to interpret phrases and sentences
7 and paragraphs, which is what I think the defense experts do
8 intend to do, which is to look at an entire subsection and
9 say, "Here is where the State Street entity is saying they
10 don't have to disclose their commissions and that their
11 broker-dealer will actually take an undisclosed markup," we
12 think that would be straying too far.

13 But if it went purely to when they use the term
14 "fiduciary," this is what people believe -- people in the
15 industry believe fiduciary to mean.

16 THE COURT: So some of that might depend on what
17 the term -- what the phrase or paragraph is and why -- the
18 more it looks like a lawyer reading a contract, giving his
19 legal interpretation, the more it's excludable.

20 The more it's -- seems like a person in the
21 industry saying, "This is a common phrase that we see all the
22 time in contracts, and this is how we understand -- people in
23 this industry understand that phrase," then it seems more in
24 the genre of like talking about a particular term. Some of
25 that is context. That's how -- so I don't necessarily

1 disagree with you, but some of it depends on what it is.

2 MR. JOHNSTON: Right. And maybe that's just, in
3 trial, we will object as we see needed as -- if the testimony
4 starts to stray in that direction, we believe that defense
5 does --

6 THE COURT: I think -- so helpful that you made the
7 motion, because it got me thinking about the issue. I don't
8 know that I can rule on the issue until I know more. I have
9 this general thought, in terms of the evidence, how I would
10 view -- I'm thinking about things maybe being admissible or
11 not.

12 MR. GOLDSTEIN: I'm just upset that Mr. Johnston
13 got to speak before I did in the case. But I think we
14 understand the Court's --

15 THE COURT: That's only because you're such a
16 shrinking violet. You're not supposed to be a potted plant.

17 MR. GOLDSTEIN: We understand the Court's ground
18 rules. I think the testimony is going to fall within the
19 proper context that the Court set out, but -- so we
20 understand.

21 THE COURT: So let me give you two other, sort of,
22 thoughts. One was that I don't know that he can say
23 sophisticated clients seem to accept the banks are making
24 money beyond the explicit fee. That seems like he's just
25 testifying what people think about. It's one thing to say --

1 maybe it's relevant, maybe it isn't relevant that --

2 There's a couple of different kinds of providers of
3 these services, and they make money in a couple different
4 ways, in different ways. This provider makes -- this kind of
5 provider makes -- typically works this way, this kind of
6 provider typically works that way, this kind of provider
7 typically works this way. State Street is one of those three
8 kinds of providers. That might be relevant to provide
9 context, or it might bear on materiality.

10 But it seems like, at least put that way, they just
11 seem to accept -- I mean, how does he know what people seem
12 to accept, that there's an -- that might --

13 MR. GOLDSTEIN: No. I think the testimony is going
14 to be more in the line in terms of his experience in the
15 industry and how the industry, as a whole, works in this
16 particular sector.

17 And so to that extent, I think, if he does testify
18 to that -- in that context, Your Honor, it's going to be
19 couched in the sense that here's his expertise, he's his
20 experience in the particular industry, and here's how
21 participants within that particular industry understand how
22 these different sectors of the industry work, where
23 particular people might make money in that particular sector
24 of the industry.

25 THE COURT: I'm also dubious about this whole

1 aborted attempt to require full disclosures in the regulatory
2 context, which is in -- of a piece with, but maybe different
3 than, the Senate bill. It wasn't quite clear why that -- I
4 am not so persuaded of that.

5 MR. GOLDSTEIN: And again, we'll broach the topic
6 with the Court before we try to elicit any testimony in terms
7 of that field attempt.

8 THE COURT: On the other hand, just on the RFPs, I
9 could see it being more of a piece that, you know, that
10 people in the industry, typically there's an RFP, people
11 respond, in my experience, typically view that as the
12 starting point, but not the binding agreement; that these
13 other things are the agreement. He could -- he -- especially
14 if it's more couched, "And this is how -- this is typically
15 how it works, this is the custom and practice in the
16 industry," seems more -- that seems more acceptable.

17 Any questions about that one?

18 MR. FRANK: No, Your Honor.

19 THE COURT: The Government's motion to preclude
20 introduction of self-serving hearsay in the undesignated
21 audio recordings. So I thought about that a lot. Well,
22 there are two parts to that. First, the designation part
23 that you're asking for. I'm inclined to agree with
24 Mr. Weinberg, given the representations he's making about
25 what he's disclosing and when, that you put in your response,

1 if you do that, that seems to resolve it. I recognize there
2 could --

3 MR. FRANK: I'm sorry, what is Your Honor referring
4 to?

5 THE COURT: This is you wanted him to designate in
6 advance all the audio portions he's going to use in
7 impeachment and produce transcripts. That was my
8 understanding of what you were asking for and -- or one of
9 the two things you were asking for in that motion, in a big
10 picture way. And he has said, no, I don't think I have to do
11 that in advance, but I will notify you --

12 Essentially, I understood when you get up to do
13 your cross? Is that what you're talking about?

14 MR. WEINBERG: My thought is we have prepared
15 either transcripts or we have prepared verbatim summaries, I
16 don't know until after hearing direct, you know, which ones I
17 will preliminarily intend to use. And I may not know until I
18 determine whether or not the witness --

19 THE COURT: What they're saying --

20 MR. WEINBERG: -- is or is not going to agree with
21 my leading questions regarding certain subjects.

22 But to the extent that I intend to play an audio
23 that I believe satisfies Rule 16, I will provide Mr. Frank,
24 at that time, a transcript.

25 THE COURT: So my question is, why can't you give

1 to him when you stand up? The reason I ask is -- the reason
2 that I wonder about that -- or one of the things, as a
3 practical matter --

4 As a general matter, I think you don't have to
5 disclose those things until you start to ask the question,
6 the way you proposed. But there are a lot of audio
7 recordings here. And to the extent that he wants to look at
8 and consider an audio recording, if you're doing it at that
9 moment, to key it up, to look at it, put it on headphones and
10 listen to it, or if they have a transcript or whatever, is
11 somewhat cumbersome. It doesn't seem to impair your ability
12 to do the cross, if you give it to him at the beginning of
13 the --

14 Why would it impair your ability if you give it to
15 him at the beginning of the cross?

16 MR. WEINBERG: (A), I think that the -- giving him
17 a transcript would be --

18 THE COURT: I'm not ordering you to prepare a
19 transcript you don't have.

20 MR. WEINBERG: They are. So in other words, to the
21 extent they're not -- that we have substantially verbatim
22 summaries of a whole thing of things that I have --

23 THE COURT: So all the things you want to cross on,
24 like this, what you view is a substantially verbatim
25 transcript.

1 MR. WEINBERG: Yes. And to the extent I elect to
2 use it. And maybe it's five, six, eight, rather than the 50
3 that are in the kind of options. I would give Mr. Frank, at
4 that time, as I would give him if he asked for a transcript
5 of a prior inconsistent statement, or an e-mail that I
6 contend constitutes a contradiction, I would have a Post-it
7 where, in the transcript, I intend to go.

8 He could certainly, just as he would with a
9 document, look at the transcript. I represent the
10 transcripts were prepared by a third party. They're as
11 accurate as the transcripts the Government has prepared to
12 use on direct exam. And that more than satisfies the
13 requirements on 613.

14 MR. FRANK: Your Honor, a couple of points. The
15 transcripts that the Government is using on direct exam are
16 being each individually reviewed by the witnesses who are
17 introducing those transcripts, corrected by those witnesses,
18 and will be vouched for by those witnesses. That cannot be
19 the case for transcripts that are used on cross-examination.
20 And I will tell you that these transcripts prepared by third
21 parties are littered with errors. These are complicated
22 terms that -- financial terms that just -- and proper names
23 that can be confusing to somebody preparing a transcript.

24 The second point is, audio is inherently different
25 than a document. A document can be scanned in its entirety,

1 can be looked at. We can see the entire thing. With audio,
2 we actually have to listen to it. Some of these recordings
3 are a minute or two minutes. Some of them are 15-minutes
4 long. So I cannot be -- to the --

5 Well, there's two issues. One is the use of that
6 as impeachment and my ability to actually redirect the
7 witness. The second issue is what the jury hears. And
8 there's -- there should -- that should be no different from a
9 document, where -- it can't just be put in front of the jury.
10 It -- and what I understand counsel to be proposing is that
11 it is put in front of the jury. Because once it's been
12 played, it can't be unplayed. Once it's been played in open
13 court. There's no document that he would be able to just put
14 in front of the jury --

15 THE COURT: No. But he could pull up, couldn't he,
16 and say, "Didn't you" -- holding the piece of paper, "Didn't
17 you write an e-mail on such and such a date, to so and so
18 person and say this"?

19 MR. FRANK: For sure. Yes.

20 THE COURT: And he's essentially put the document
21 in front of the jury.

22 MR. FRANK: It's very different from actually
23 playing -- putting the document in front of the jury and
24 playing audio in front of the jury. He can say, "Didn't you
25 say this to this person in a phone call?" Sure. He can then

1 play a phone call for the witness on headphones. But to
2 actually play the audio in front of the jury --

3 THE COURT: So I guess there's a couple of
4 different issues. One, I don't see why playing it -- you
5 know, I guess I'd say this. In the first instance, if
6 there's questions about audio, then we can play headphones.
7 We can do it with headphones. What I would -- I'm assuming,
8 based on my experience in this case and the presumption that
9 I would generally indulge in, but -- for both those reasons,
10 that the things that were being played were, in fact,
11 impeachment, were admissible, and that there was a good-faith
12 basis to believe they contained the statements that would
13 render them appropriate to play, if I heard them in advance
14 and if you heard them in advance.

15 Now, that presumption could shift, if it didn't
16 play out that way, after -- you know, in the course of the
17 trial, right, one by one. Right? But we could also -- the
18 question of putting on -- I know you want to put it on
19 headphones. We can do that, potentially. And that mitigates
20 or resolves the issue of the jury hearing it before we've all
21 heard it and resolves whatever issues are presented by it.

22 MR. FRANK: But if there's a 30-second excerpt from
23 a ten-minute recording, Your Honor, we can't know whether
24 that's misleading, whether that's out of context, unless
25 we've heard the recording. And while I respect

1 Mr. Weinberg's point that I'm obligated to know my evidence,
2 there are 14,000 recordings here. There's a practical issue,
3 and it's a little bit unfair. And I think it's particularly
4 unfair where the reality is defendants put in their case on
5 cross-examination.

6 So the line between what is impeachment and what is
7 their case in chief is a very thin line. And he's obviously
8 got these transcripts and summaries prepared. He knows what
9 he intends to use, so I think it's a little bit unfair to
10 say, "I don't know what's going to come up in trial, and I
11 can't give you a heads-up the day before I examine this
12 witness."

13 What I might use -- there could be a requirement
14 that we not discuss it with the witness, but at least --
15 which we would be prepared to abide by. But at least the
16 opportunity to hear the recording in its entirety, so that we
17 don't have to stop the trial in the middle every time he does
18 this to --

19 THE COURT: That's the practical reason.

20 MR. WEINBERG: But he doesn't have to, Judge. The
21 rule does not require that Mr. Frank listen to ten minutes,
22 if the contradiction is 30 or 60 seconds, because he has
23 redirect. He will get the tapes that I use.

24 THE COURT: But how is this a practical matter?

25 You cross them, he learns right before you ask on -- you

1 impeach the witness with a 30-second contradiction on your
2 cross. He gets it right then, he looks at the verbatim
3 transcript. Maybe it's not apparent to him, completely, from
4 the --

5 This is a verbatim transcript of the whole ten
6 minutes?

7 MR. WEINBERG: Most of them are verbatim
8 transcripts of the full ten minutes. Some, as I say, are in
9 reserve, in case, and they are substantially verbatim
10 summaries.

11 Mr. Frank, if he looks at it and says, "Wow, this
12 doesn't seem like a contradiction," we can deal with it. But
13 I think these are fairly blatant contradictions. I have got
14 a lot of tapes to select amongst. I have got some
15 credibility that I hope is as great with the Court after the
16 trial as before and as great with Mr. Frank as before. I
17 don't intend to try to take a witness ten degrees and play a
18 ten-minute tape. I've told Mr. Frank, I'm not playing tapes
19 where these -- where Mr. Pennings is making statements that,
20 you know, are not relevant to the case but --

21 THE COURT: Are all the tapes you want to play
22 contradictions? That's the purpose of them?

23 MR. WEINBERG: I would best be able to answer that
24 question after I see what Mr. Frank elicits from Mr. Pennings
25 on direct. There are tapes wherein I expect the Government

1 to elicit parts of the KIA transitions. But if they do it in
2 a way that I consider distorted, they may be tapes that both
3 impeach and augment the Government's presentation on a
4 specific, you know, transition.

5 MR. FRANK: Well, augmenting -- you know, it sounds
6 like a lot like a case in chief, Your Honor.

7 MR. WEINBERG: What I don't think I'm required to
8 do, Judge, is to give Mr. Frank every tape that I have that I
9 might use. I don't think that I'm required to preview my
10 defense.

11 THE COURT: No. The -- here's the thing that I am
12 concerned about. To the extent that -- I don't want to spend
13 a lot of time putting on headphones at the trial to listen to
14 things, and I don't want to spend a lot of time recalling
15 witnesses because after you did your redirect, you come back
16 to me and the Government comes back and says, "Now we had a
17 chance this -- yesterday afternoon to listen to the whole ten
18 minutes of this, and now we want to recall the witness to
19 explain a little more about that, which we didn't have the
20 chance to do, because we didn't know about it." But that's
21 the sort of -- and the --

22 And in an ordinary case, I wouldn't be so
23 interested to this request. But there are, you know,
24 thousands of things, so it makes it more difficult to know
25 about them all, check them out. It may be that your ten or

1 80, or whatever tapes that are your likely tapes, are all
2 ones that he's heard 20 times, anyway. I don't know that.
3 But those are the practical concerns that I'm thinking about.

4 MR. WEINBERG: I don't think that this is, from a
5 cross-examination perspective, going to be loaded with tapes.
6 I do think that either because Mr. Pennings will agree to
7 certain propositions that will eliminate the requirement of a
8 tape --

9 THE COURT: This is primarily a Pennings and
10 Boomgaardt issue?

11 MR. WEINBERG: Yes. Exclusively -- well, not
12 exclusively. There's a third witness.

13 MR. GOLDSTEIN: There is a third witness, too.

14 THE COURT: Who is the third witness?

15 MR. WEINBERG: Mr. Dixon.

16 THE COURT: Who is that?

17 MR. WEINBERG: He is a consultant to the Royal Mail
18 and will be testifying regarding his --

19 THE COURT: He's the one who's referred to in the
20 e-mails as the consultant who was -- who didn't like State
21 Street?

22 MR. WEINBERG: Yes.

23 MR. FRANK: Yes.

24 THE COURT: And he's on tape, just when he called
25 State Street?

1 MR. WEINBERG: He and Mr. Boomgaardt have extensive
2 conversations on tape.

3 THE COURT: I see. When are the three of them
4 likely to testify? Or are there -- are they likely to
5 testify -- I mean, who's your first witness? Is it one of
6 them?

7 MR. FRANK: Well, now Your Honor is giving
8 Mr. Weinberg exactly what he's been asking me for, for
9 three days. Our first witness is going to be Mr. Boomgaardt.

10 THE COURT: Okay. So the issue is -- it won't be
11 joined on Tuesday, exactly, because you won't be doing your
12 cross on Tuesday. But even if you're faster -- even if it
13 goes at the speed -- it's funny that the rocket docket, which
14 is so close to D.C., is not influencing the pace of the
15 Department of Justice in its examinations. But --

16 MR. FRANK: By the way, Your Honor, just for the
17 record, we endorse all the abuse that you want to heap on
18 Mr. Johnston throughout these proceedings.

19 THE COURT: I see that.

20 You should think about that invitation,
21 Mr. Johnston, and what that means. And you know, there's a
22 central dynamic in American history that has been the battle
23 between local and central authority and back and forth. And
24 you should think about whether you should inveigh greater
25 authority in Washington to weigh down, to stamp out this kind

1 of -- this could rise up to be a potential insurrection in
2 the provinces.

3 MR. JOHNSTON: Having tried my first case in the
4 rocket docket, what is fast about that Court is getting the
5 case to trial. But once you're at trial, the attorneys are
6 given full length of time for their examinations.

7 THE COURT: Ah. All right.

8 As to Boomgaardt, so we're not going -- his cross
9 isn't going to happen until Wednesday. There is --

10 MR. FRANK: That's right, Your Honor. And what I
11 would propose is on Tuesday night, the defense disclose the,
12 you know, likely tapes that may come up on cross. We will
13 agree not to talk to Mr. Boomgaardt about them. But at least
14 then we could listen to them, and so we don't have to stop
15 the proceedings to be able to redirect him or to lodge proper
16 objections, frankly.

17 MR. WEINBERG: Here's one problem. If they
18 finished the exam of Mr. Boomgaardt, that -- I wouldn't
19 accept the proposition. It's not ideal. I think it's more
20 than what 613 requires, but at least I'd understand the
21 logic. But even Mr. Frank doesn't have two silos in his
22 head. One of the silos that is prepared ----

23 THE COURT: I understand. You don't want him to
24 then shift his direct examination to go through those.

25 MR. WEINBERG: Even unconsciously, even if he's

1 trying his best to ignore what he just heard.

2 THE COURT: All right. I'm going to think about
3 that issue. At the moment, I'm not ordering anything.

4 With respect to the individual -- so the Government
5 identified a lot of individual hearsay statements. So I
6 think for -- firstly, all of them, it's sort of a
7 case-by-case determination, based upon how the evidence is
8 coming in. I'm not ruling on them now. I don't know what
9 all the evidence is. I need to hear the evidence and then
10 hear, looking at that evidence, what is being offered, what
11 is the purpose of it, how does it fit into the case and the
12 defense and the like.

13 I will say this. I don't think every single
14 document that's created by a company is automatically a
15 business record, because it's written down by somebody at the
16 company. That -- the business record exception doesn't, in
17 this day and age, where essentially most everything happens
18 in writing, didn't transform every previously inadmissible
19 oral conversation into an admissible business record.

20 But I don't intend to resolve this on some broad,
21 plain rule about the business records exception. It's more
22 on an individual, look at the document, does this particular
23 document seem to meet the exception or not. Or was it
24 offered for a non-truth purpose, and what is that. I -- so
25 that's one thought that came to mind in looking at these

1 particular issues.

2 Let me just -- on some, I'm just not clear what the
3 purpose is. I will say, with respect to people saying "great
4 job." There's a couple, "Great job. That's really good,"
5 the two or -- those struck me -- I'm wondering about the
6 relevance of those. Those struck me as comments, "You made a
7 lot of money." I don't know what the significance is to that
8 to his defense. He made a lot of money, and so they're happy
9 about that.

10 And I think the jury, you wouldn't even need any
11 evidence. The jury can probably come to that conclusion in
12 the absence of evidence, that he made a lot of money for
13 them. But it doesn't necessarily speak at all to what the
14 issues are in the case.

15 There's one that's later, it's overblown, in an
16 unexecuted contract. I'm not prepared to rule on either of
17 those now. I don't know what -- how they fit into the case
18 and what the evidence is and what the arguments are. But I'm
19 certainly going to look carefully at those kinds of things to
20 see whether -- for what purpose are they being offered, and
21 is there really a basis to offer it for that purpose.

22 MR. WEINBERG: And I would say, without belaboring
23 it because I do think it's a document-by-document analysis,
24 just so Your Honor has further context, one of the arguments
25 that we'll be making is transparency within the bank; that

1 the revenues generated by transitions, including revenues
2 generated by transitions for which there were fees, where the
3 people in the hierarchy could see there was a fee, could see
4 there's significantly higher revenues, that the exposure of
5 the revenues to the hierarchy of the bank above Mr. McLellan
6 will be contended to be circumstantial evidence that
7 Mr. McLellan, in good faith, believed that the business model
8 that was generating these revenues was not being concealed
9 from State Street. And part of the Government's allegation
10 is that this was a concealment from clients and a concealment
11 from State Street.

12 THE COURT: So my understanding -- and correct me
13 if I'm wrong -- is that there were two different
14 concealments; that it's alleged that the defendant was
15 concealing from the customers these so-called secret
16 commissions or markups, or what have you, and that -- I don't
17 understand there to be -- I didn't understand there to be an
18 allegation that he was concealing from State Street the
19 revenues.

20 MR. FRANK: That's correct, Your Honor. He's --

21 THE COURT: What he's concealing from State Street
22 is the fact that the customer doesn't know that he's charging
23 the so-called secret commissions.

24 MR. FRANK: That's exactly right. And just to be
25 clear, the defense has marked an entire binder full of

1 monthly and daily revenue updates that were distributed
2 around the bank. We haven't objected to any of those.

3 THE COURT: Have not.

4 MR. FRANK: We have not. Those set forth the
5 generation of revenues. But it's the question of how the
6 revenues were generated and what the customers knew about
7 that, that's the issue.

8 MR. WEINBERG: I agree. It's not a home run that
9 there is the \$3 million they made from --

10 THE COURT: So the admissibility of those documents
11 is not at issue, because everyone agrees that, "Whoo-hoo,
12 yeah" --

13 MR. WEINBERG: That gets me like halfway from third
14 base to home plate. And the home plate part would be that
15 Mr. McLellan sees the people who are above him, as he was
16 allegedly above Mr. Pennings, saying, "Great job." These are
17 professional bankers. You know, they know how monies are
18 generated by fixed income transactions. And I think I could
19 use that as, again, a building block towards good faith.

20 THE COURT: Maybe. Maybe not. I mean, I think it
21 just depends whether there's -- what the evidence is and
22 whether you can draw the inference that a higher-up who says
23 "great job" is -- you know, could reasonably be inferred to
24 have -- be endorsing what was not just the charging of the
25 commission, because there's, really, here --

1 The Government is not contending that State Street
2 couldn't, as a matter of law, charge these commissions,
3 right? They could have done this.

4 MR. FRANK: That's right.

5 THE COURT: It's just saying it was no good,
6 because they said they weren't.

7 MR. WEINBERG: I think Your Honor has put your
8 finger on one of the essential battlegrounds in this case.

9 THE COURT: Okay. So some of these things I could
10 see -- I don't think that they turn completely on whether
11 they're admissible for the truth of the matter asserted.
12 Some of them, I will tell you, I understand the defense
13 arguments to be not for the truth of the matter asserted, and
14 then it just depends. I'm not really -- I don't know enough
15 about the case, yet, and the particulars of each thing, each
16 document or statement and where it fits in, to know whether
17 it comes in for or not for the truth of the -- for one of
18 these other purposes. And it might vary from -- I think it
19 likely would vary document to document, at least require an
20 independent, individual examination.

21 One theory that you advance, Mr. Weinberg, is very
22 interesting. I'm not -- I haven't -- I'm just not sure about
23 it. I have -- it raises a number of considerations and that
24 is the idea that a defendant who has pled guilty and admitted
25 that, therefore, he has a guilty mind, could be impeached

1 with -- if you will, there could be evidence that, if he were
2 on trial, might be admissible to show good faith. It might
3 not be a home run, but it might be a fact that tends to show
4 he knew it, he knew it at the relevant time, before he -- at
5 a relevant time of the criminal activity, and it might bear
6 on his good faith.

7 But the idea, when he's -- but you want to admit
8 that, even though he's pled guilty. And so that --

9 MR. WEINBERG: I -- exactly. I don't think -- I
10 don't think a 2018 or 2017 decision that it's in my
11 self-interest to plead guilty and I pled guilty in an
12 American courtroom, necessarily means that, in 2010,
13 Mr. Pennings didn't, at least in part, do things he thought
14 at that time were legal. Maybe he thinks they're not legal
15 now. There are -- it raises a host of important, interesting
16 issues.

17 THE COURT: Well, no. He's admitting not only that
18 he thinks now they're not legal, he's -- he admitted that he
19 then had a guilty mind; that he couldn't have pled guilty now
20 if he doesn't now think that he then had a guilty mind. This
21 isn't, I don't think, the situation where everyone agreed as
22 to what happened, and he said, "Oh, when I did it, I thought
23 I didn't commit a crime." But there's -- it's a strict
24 liability criminal offense, and now I appreciate that it is
25 illegal. I didn't know that, but I also now know that

1 doesn't matter.

2 MR. WEINBERG: I think Your Honor will see that
3 this is not a black and white circumstance. This is -- you
4 know, part of my defense, just so Your Honor has that
5 framework, is not limited to good faith, not limited to
6 Mr. McLellan's lack of criminal intent.

7 I think there's a strong argument here that many,
8 if not all, of the transactions charged by the Government,
9 are not a crime. I can say, when I went over all the
10 ConvergEx stuff and read how the Southern District of New
11 York treated ConvergEx, they actually got a criminal plea
12 from the company. But the chief of the company, the man that
13 was in Mr. Pennings or Mr. McLellan's position, resolved this
14 case through an SEC settlement.

15 This is not like a bank robbery, it's not like
16 everybody knows it's a crime. There are delicate and nuanced
17 issues about just what did and did not violate American fraud
18 laws, or much of the conduct -- the contracts were between
19 British clients and a British entity of State Street.

20 MR. FRANK: Just to be clear, there was an
21 individual charged in the ConvergEx case. That comes up in
22 the --

23 THE COURT: That's not coming up in this trial.

24 MR. FRANK: It's not, but --

25 THE COURT: Right.

1 MR. FRANK: I don't want the Court to be under the
2 illusion that individuals were not charged with committing
3 crimes in that case.

4 MR. WEINBERG: Well --

5 THE COURT: You know what? It's too far afield. I
6 don't -- to understand the significance of all of that, I'd
7 have to understand the case to come to my own independent
8 judgment, in other words, why people -- why something might
9 have happened in a particular case or it didn't happen and
10 what it all meant.

11 MR. WEINBERG: I guess all I wanted to do was
12 communicate that I don't think Mr. Pennings' plea preempts an
13 argument that -- if I make it, that not only did Mr. McLellan
14 lack criminal intent, but he also did not commit a crime.

15 THE COURT: So I'm not -- I don't think the
16 Government has moved to preempt an argument that you might
17 make in close about that. The -- more the question is
18 whether a particular document that was given to Mr. Pennings
19 that, let's just say for sake of discussion, would be
20 admissible on a trial on these charges of Mr. Pennings, that
21 would be admissible to potentially -- because it might be
22 admissible to show his good faith, even if it isn't
23 admissible for the truth of the matter asserted.

24 Whether it's -- where there's no evidence your
25 client understood it, or it's not coming in for you to

1 impeach Mr. Pennings, it's not coming in where he admits that
2 he told Mr. McLellan about it, those are different avenues.
3 But where it's just coming in to say, well, it goes to his
4 good faith, he's a co-conspirator, and there's no conspiracy
5 unless the two of them had guilty minds together and, so I
6 could consider -- that argument is interesting.

7 MR. WEINBERG: I would say that Mr. Pennings' plea
8 does not stop Mr. McLellan from arguing that there was no
9 meeting of the minds, because both Mr. Pennings and
10 Mr. McLellan lacked a criminal intent to enter --

11 THE COURT: I don't think it stops you from making
12 the argument.

13 MR. WEINBERG: And these are the building blocks of
14 that argument, which are their e-mails. Many of them are
15 e-mails right in the -- not only during the conspiracy, but
16 e-mails during the very transitions that the Government
17 claims are a crime. And this really could go -- I mean, we
18 were talking about it. If you had a -- like a video with an
19 audio and a robbery, you certainly would be able to admit it
20 because that's the act. Well, these e-mails between the
21 clients and State Street, between Pennings and the
22 representatives of the clients, between Pennings and
23 Boomgaardt, are the transition, and we ought to be able to
24 admit it.

25 THE COURT: Those are considerations that you need

1 to think about, because I'll be thinking about those --

2 MR. FRANK: And just to be clear, we're not
3 objecting to their uses as impeachment evidence.

4 THE COURT: Right.

5 MR. FRANK: We're objecting to their admission as
6 part of the defendant's case in chief.

7 THE COURT: Right.

8 MR. FRANK: He can ask the witness about it.

9 THE COURT: Yes. No, no. Right. I understand the
10 motion is not directed at that, but it might -- he wants to
11 admit it, not necessarily for the truth, but he wants to
12 admit it not just to -- well, it may be that sort of this is
13 a fine academic point that's not really relevant, because
14 Mr. Pennings is going to say, "Yes, that was told to me, and
15 I was aware of these things at the time," and that may
16 resolve some of these issues, depending on what the testimony
17 is.

18 MR. FRANK: Just a procedural matter, Your Honor.
19 So what I understand Your Honor to be saying, with respect to
20 our motions on these documents, is that we're going to do it
21 on a case-by-case basis. And we get that. The Government's
22 intention for our case in chief had been to introduce our
23 exhibits in bulk, and that would obviously not be possible on
24 a defense case where we're going document by document. But
25 we think it should be possible for our case to expedite

1 things. And since there haven't really been objections to
2 any of our exhibits --

3 THE COURT: I don't --

4 Do you object to that process?

5 MR. WEINBERG: I object to it, unless I know what
6 documents Mr. Frank wants in. Some of them, you know, we
7 will not have objections to. Others --

8 THE COURT: So let me say this. As a general
9 proposition, to the extent there are documents that you have
10 that are not objected to, for both -- for you, in the
11 presentation of your case, I am generally happy to have you
12 just say, "These are all admitted," either en masse --
13 because they're unobjectionable. And I'll explain to the jury
14 that sometimes there will be objections, sometimes there
15 won't. You need to --

16 I'm sure you're sharing the list, already, but
17 clarify as to what the scope of that is. I'm -- and I'm
18 amenable when you -- you're --

19 You anticipate presenting a case, right?

20 MR. WEINBERG: Yes.

21 THE COURT: So I'm amenable, when you get to your
22 case, to doing the same thing. I'm also amenable, to the
23 extent you come in in the morning, you tell me, "Judge,
24 there's nine more exhibits one or both of us are going to be
25 doing today and there's no objections to them." Like when

1 you first go to use that exhibit, just say, "Judge, this is
2 Exhibit 10 I'm about to ask the witness about. I move it
3 without objection into evidence."

4 "Is that correct?"

5 "Yes."

6 In evidence, done.

7 And -- along the way. And I would do that for both
8 of you.

9 In other words, to the extent that it's agreed to,
10 I don't want to spend time on it.

11 MR. WEINBERG: And it may be, Your Honor, that we
12 would ask the Court, at the time the Government offers
13 exhibits, to also admit defense exhibits to which there is no
14 objection, which are relevant.

15 For instance, I don't mean every one of their 20
16 witnesses, but Mr. Boomgaardt, the Government is going to
17 plan to put in five hours worth of testimony, which is going
18 to probably include 30, 40 different exhibits. We may want
19 15 or 20 exhibits that are Boomgaardt-related that we may
20 want to ask him about.

21 THE COURT: So I will tell you both that I tell the
22 jurors at the end, like, it doesn't matter who offered the
23 exhibits. It's the evidence that matters. I'm happy, if
24 there's no objection to those exhibits, as to whatever they
25 are, that, you know -- if they're agreed to, if they're

1 exhibits that will be in evidence and to which there is no
2 objection, then to -- you know, I'm open to hear from all of
3 you, to admit them all at once. I'm happy to just say
4 there's a whole bunch of exhibits that are coming in evidence
5 and not particularly spend any time identifying whose they
6 are. It doesn't really, to me, matter whose exhibit it is,
7 like what -- although they're probably labeled "Government"
8 and "defense," that that doesn't really matter. But so I
9 don't have any -- I'm not adverse to doing that, but I'd want
10 to hear from Mr. Frank and how he feels about it.

11 MR. WEINBERG: Okay. Maybe we can start with
12 Mr. Boomgaardt, and we can get our hands around the groupings
13 of the exhibits that we want to use. And we probably don't
14 have many objections to much of what the Government wants to
15 put in through Boomgaardt and that --

16 MR. FRANK: I'm not sure I've ever seen defendants
17 introduce their own case in chief through the Government's
18 witnesses. I'm not sure what Mr. Weinberg is proposing.

19 THE COURT: So I don't -- I guess all I'm saying is
20 this. I would ordinarily think you would do your exhibits
21 for your case when you start. But to the extent there are
22 exhibits you are going to introduce along the way in the --
23 either with the first witness or the Government's witnesses,
24 that you're going to seek to introduce into evidence at that
25 point, if they're not objected to and we're just going to, en

1 masse, move a bunch in, I don't mind moving in -- I'm okay to
2 move in more, rather than doing them one by one when they
3 come up.

4 None of that precludes doing things either one by
5 one, or in groups in the morning, or just as you go, if
6 they're not objected to. If they're objected to, then we do
7 it in the ordinary course, and we lay the foundation and the
8 like. But that seems like something maybe you should talk to
9 each other about in the first instance.

10 I want to touch briefly about a couple other
11 points, to give you some things I was thinking about. One
12 is, there was another motion the Government made about
13 inadmissible and irrelevant third-party hearsay. I'll tell
14 you a couple tentative thoughts I had, because this might be
15 helpful.

16 I read this memo that's a comparative -- it's by
17 the consultant -- it's a comparative assessment of the bids.
18 I might be -- I'm not ruling that out automatically. I could
19 see that as potentially relevant to materiality. And I'm
20 going to allow the victims to testify not only to what they
21 heard, but why they thought it was important, essentially
22 what you want to do.

23 MR. FRANK: And the issue with that one, Your
24 Honor, is -- one of the issues with that one is there's
25 actually no witness for that document. There's no witness

1 that we're calling from that victim or from that consultant.

2 So I'm not sure how that comes in.

3 THE COURT: You mean from an authenticity
4 perspective?

5 MR. FRANK: Not just from an authenticity
6 perspective, but who's to interpret that document. It's just
7 being --

8 THE COURT: Well, I think there needs to be some
9 foundation. Somebody needs to say it was received. To me
10 it's relevant that it was received by the victim. That's how
11 I was thinking about its potential relevance. I'm not ruling
12 it in, but to the extent the victim got it, it potentially
13 bears on it's information that the victim considered in
14 thinking about whether it was important or not and these
15 different types of considerations. What you're raising is
16 sort of a procedural issue, like how do we know the victim
17 got it. How do we know they sent it, right?

18 MR. FRANK: And even if they got it, how do we know
19 they read it, how do we know they understood it, how do we
20 know that they thought about it. All of these, without a
21 witness, we're just going to be putting in hearsay documents
22 and then arguing what they meant to people.

23 THE COURT: Those are -- those are considerations
24 about --

25 MR. WEINBERG: Maybe we should just strike this

1 transition from being an object of the conspiracy, if the
2 Government has chosen not to call a witness that we can
3 introduce material and relevant evidence through.

4 THE COURT: This is the Royal -- this is the
5 British banking, right?

6 MR. FRANK: No, Your Honor. This is Eircom, which
7 is an Irish phone company and its pension fund.

8 THE COURT: It's within the conspiracy, but not
9 otherwise part of the case.

10 MR. FRANK: And you know, once again --

11 THE COURT: Are you presenting any evidence about
12 them?

13 MR. FRANK: There will be reference to Eircom.
14 It's not going to be an extensive part of our case. They
15 were another victim of the fraud. There's not -- it's not a
16 substantive count; it's wrapped up in the conspiracy.

17 THE COURT: What comes in related to them?

18 MR. FRANK: There will be testimony about the
19 fact -- I'm not sure --

20 MR. JOHNSTON: Mr. Boomgaardt will testify about it
21 and representations that he made and assisted and --

22 THE COURT: So he'll -- will he testify in short
23 form to this: I talked to them, I got them as a client, I
24 told them this. That was untrue, we charged commissions that
25 I didn't -- that I represented to them I wasn't charging?

1 MR. JOHNSTON: Yes.

2 THE COURT: Okay.

3 MR. FRANK: But then to have an internal e-mail
4 between an Eircom consultant, who's not here, and an Eircom
5 witness who's not here -- there's been no effort by the
6 defense to get any Eircom witnesses. They never tried to
7 depose any Eircom witnesses. They just want to put in
8 hearsay documents.

9 MR. WEINBERG: This is Ireland. Ireland told us
10 that you can have as many letters rogatory as you want, we
11 don't honor them, unless the United States Department of
12 Justice, through MLAT, asks the central authorities in
13 Ireland to produce records.

14 MR. FRANK: The consultant is in London, Your
15 Honor.

16 MR. WEINBERG: Yes. But the client is in Ireland.

17 MR. FRANK: But the document from the consultant is
18 in -- that document that's in question was produced by a --

19 MR. WEINBERG: No question. Because we couldn't
20 get the documents, because Mr. Frank wouldn't move under
21 MLAT.

22 THE COURT: Right. But what the -- that somebody
23 read it would come from Ireland.

24 MR. FRANK: The person who received the -- the
25 people who received it are in Ireland. The people who sent

1 it and who could testify about it --

2 THE COURT: But they could only testify, at most,
3 that they wrote it, and they could maybe say --

4 MR. FRANK: They discussed it with the client.

5 There's a whole range of things. My point is only that, to
6 just simply introduce this hearsay document --

7 THE COURT: It's a consideration. I'll think about
8 that. I was not aware of that or hadn't perceived that.

9 Are the requests -- the responses to the RFP also
10 to the same victim? There was some discussion in the motion
11 about responses to requests for proposal from which State
12 Street emerged as the successful bidder. Was it that same
13 victim?

14 MR. FRANK: I believe that refers to the responses
15 to AXA, Your Honor.

16 THE COURT: Oh. To the US one.

17 MR. FRANK: I'm trying to find what we were -- at
18 the bottom of page 2, that was -- of our motion, that was
19 responses by other companies to AXA.

20 THE COURT: Okay. All right. That's -- I could --
21 that's within the realm of the information the victim was
22 considering at the time that they were evaluating --

23 MR. FRANK: And we would have no objection to it
24 being used for impeachment purposes. The question is whether
25 it comes in as an exhibit, Your Honor.

1 THE COURT: I guess the content of it, which is as
2 far as I had gotten in thinking about it, was that I could
3 see it bearing on this is the choice they were making at the
4 time, and the choice between what was said to them by
5 Boomgaardt or by Pennings or by McLellan or whomever. And
6 this is among the range of choices that they were facing, and
7 that might be something that might bear on the jury's
8 evaluation of the materiality.

14 THE COURT: Impeached, no. You didn't care about
15 this, because here are all the other things.

16 MR. FRANK: Did you receive a proposal from X, Y, Z
17 bank? Did the proposal --

18 THE COURT: You mean impeaching the materiality.
19 That's what you mean when you say --

20 MR. FRANK: To the extent that it's relevant.
21 Because it's -- on the issue of materiality, the witness from
22 AXA can be asked about whether they received and reviewed a
23 proposal, what consideration they gave to proposal, et
24 cetera. The question is whether the proposal itself is
25 admissible under the rules of evidence, and our position is

1 that it's not.

2 THE COURT: All right. Well, that presents two
3 parts. The content -- subject matter is --

4 You don't object to the --

5 MR. FRANK: We don't object to the relevance of the
6 document. We object to its admissibility. We don't think
7 it's a business record. We don't think it should be
8 admitted, you know, under that rule. But we certainly think
9 the witness can be asked about the fact that they received
10 other proposals, and this is what those proposals offered.

11 MR. WEINBERG: Well, I'm not 100 percent sure I
12 know which document we're referring to but --

13 THE COURT: I think we're referring to the one --
14 if it's the -- the responses to the requests for proposal to
15 the victim in Count 6.

16 MR. WEINBERG: I thought those were mostly Eircom.
17 But if it is AXA and it was received from AXA, that may
18 qualify under the business record exception.

19 MR. FRANK: These were documents prepared by
20 BlackRock and ConvergEx, actually, when they were bidding on
21 the AXA transition. They were submitted by those entities to
22 AXA. I don't think they become AXA business records.

23 MR. WEINBERG: Well, they were either received from
24 AXA or received from State Street, so somebody kept them in
25 the ordinary course of business, you know, based on an

1 evaluation of which of multiple banks was selected. It
2 certainly would qualify under 807, if not 8036, and it's
3 certainly highly relevant.

4 MR. FRANK: Not for its truth, Your Honor. And the
5 fact that it was received and maintained doesn't make it a
6 business record of the company. There's still not going to
7 be testimony about whose practice it was to produce the
8 document, what information they produced it from, all of the
9 other requirements of the business records rule.

10 THE COURT: I'll have to think about that one.

11 One last point I want to raise with you, which is
12 the deferred prosecution agreement. Am I correct, Mr. Frank,
13 that you want it on the following theory, that State Street
14 entered into this DPA after the -- it learned about -- at
15 some point after it learned about the conduct that gave rise
16 to Counts 1 to 5, that they entered into this deferred
17 prosecution agreement. It cost them lawyer money, it cost
18 them fines, or something, and it cost them money to pay for a
19 monitor. And from that, the jury could infer that the
20 conduct giving rise to Count 6, which occurred at the same
21 general time period as the conduct giving rise to Counts 1 to
22 5, either caused them -- cost them that amount -- those kinds
23 of money, or would similarly cost them money.

24 MR. FRANK: Certainly that last point, Your Honor.
25 There is an additional point, which is that under the DPA --

1 so yes, the conduct --

2 THE COURT: The fact that other similar conduct at
3 the same time cost them money is a basis to infer that this
4 conduct would also cost them money.

5 MR. FRANK: Would -- yes, Your Honor. In addition,
6 it actually did cost them money as a result of the DPA,
7 because the DPA requires State Street to disclose evidence of
8 fraud to the Government, which State Street did when it
9 learned about AXA, which resulted in additional expenses to
10 State Street, namely the need to reimburse AXA, likely the
11 need to reimburse AXA additional costs; the need to conduct
12 an investigation of what happened with AXA, for which they
13 hired outside lawyers; the need to hire auditors to go over
14 the transaction. So the DPA itself led to costs related to
15 AXA, but also the conduct.

16 THE COURT: So why do you need the DPA? Why isn't
17 it enough to say -- to put in the following two things in
18 evidence? One, that State Street learned about this conduct
19 that gives rise to Count 6, and then it cost them -- they did
20 the following things which cost them money? They reimbursed,
21 they paid for investigation to the company, they did
22 auditors, they did the things that they did, and that that
23 cost them.

24 And then -- and then there were similar conduct
25 that you heard about in Counts 1 to 5, that the defendant

1 engaged in, and that, too, cost them money, because they
2 hired a monitor, they reached a settlement with the
3 Government that cost them money -- or something like that.

4 MR. FRANK: So let me just be clear. In the reply
5 brief, Mr. Weinberg suggested that we not put in the
6 statement of the facts that's appended to the DPA. That
7 seemed to be the main part of his objection, that admitted
8 statement of fact --

9 THE COURT: Is that the main part of the objection?

10 MR. WEINBERG: It's one of the many main parts of
11 the objection.

12 MR. FRANK: We would have no objection to leaving
13 out the statement of facts. The fact that State Street paid
14 a 60-plus million-dollar criminal money penalty in connection
15 with this conduct is highly relevant to the fact that the --
16 that it was affected as a financial institution. And so it's
17 not just -- it's not just the fact that they paid money to
18 the Government, it's the fact that it was a large amount of
19 money, that it was a criminal money penalty, that it affected
20 their business.

21 There will be testimony that, as a result of that
22 criminal penalty, they shut down their transition management
23 business in London. There have been serious repercussions to
24 the financial institution all around this. And if the
25 defense is not prepared to stipulate that the financial --

1 that the company was affected, which is the other way around
2 this, we feel we should be able to put in this document.

3 MR. WEINBERG: But it's being affected as to counts
4 that are not charged as bank fraud, that don't have the
5 elements.

6 THE COURT: The affected person -- who has to be
7 affected?

8 MR. FRANK: State Street Corporation.

9 MR. WEINBERG: As to AXA. As to the AXA
10 transaction.

11 THE COURT: But the AXA fraud -- if proved as
12 fraud, the AXA fraud has to have affected State Street.

13 MR. FRANK: Has to have created a reasonable
14 likelihood, an increased likelihood, of harm.

15 THE COURT: But it's State Street who would be
16 affected.

17 MR. FRANK: Correct.

18 MR. WEINBERG: And State Street affected by the
19 alleged AXA fraud, if proven, which means that it's not --
20 it's irrelevant that State Street was affected by the
21 Counts 1 through 5 alleged frauds that generated a decision
22 by State Street to pay 60 million. It had nothing to do with
23 AXA.

24 Instead, the Government can elicit through the
25 State Street witness, consistent with Your Honor's questions,

1 you know, "What happens when State Street discovers something
2 wrong?"

3 "We conduct an investigation."

4 "Are you at risk of an SEC penalty?"

5 "Yes, we are."

6 Four or five general questions that meet the
7 requirements of the -- of that element of Count 6.

8 The last thing they should be able to do is to
9 prove they've paid damages as a result of Counts 1 to 5,
10 which don't --

11 MR. FRANK: Your Honor --

12 MR. WEINBERG: Let me finish, Steve.

13 -- which don't have the same elements as Count 6.
14 That's the kind of spillover prejudice that really warrants a
15 reconsideration of the severance, that the Government is
16 going to push to get in State Street's admissions to Counts 1
17 to 5.

18 MR. FRANK: He has the right to put me to my burden
19 of proof. But if he's going to put me to my burden of proof,
20 I have the right to introduce what actually happened. And
21 what actually happened is that, as a result of identical
22 conduct by the identical person, at the exact same time,
23 State Street paid a criminal money penalty of
24 \$60-plus million, that resulted in the shutdown of its London
25 transition management business.

1 So the jury is entitled to conclude from that, that
2 the identical conduct would have made that result even worse
3 had it been -- had it come to light at the time. And in
4 fact, even when it came to light later, it did have
5 additional repercussions, in addition to the \$62 million that
6 they paid.

7 MR. WEINBERG: The London office was not shut down
8 because of the discovery of --

9 THE COURT: So let me stop you here. I want to
10 think about this a little bit more. I think it would be
11 maybe useful, after I thought about it a little more, to talk
12 to you again about it.

13 I -- one concern that I have is that there's an
14 inference that, because State Street pled guilty, he did it.
15 That's not admissible, you're not offering on that on Count 1
16 to 5. And so absolutely, if he doesn't stipulate, you're
17 entitled to prove your case, including that element of
18 Count 6; but in doing so, I think about whether there is
19 something that would cause a problem in some way. Right?
20 Just like you can only prove it in the rules of evidence. So
21 that's a concern I have about that, and so you should all
22 think about that. I'll think about that.

23 I have one last question for you. I've been
24 talking this whole time, going back and forth with you on
25 different issues that I wanted to address. I don't really

1 have any more time today, but I do have more time either
2 tomorrow, or probably more likely Friday afternoon. And so
3 I'm wondering, if there are -- beyond this DPA issue, which I
4 might want to talk to you more about before Monday, is there
5 any issues that you all wanted to raise with me? Not so much
6 that we go over them now, but that would --

7 MR. FRANK: Just a housekeeping matter. We'd like
8 to use a PowerPoint during the opening.

9 THE COURT: I don't have a problem with that. You
10 can do that. I'll give you the advice that it's a good idea
11 to run it by the other side. I had one of your colleagues
12 once, who used a PowerPoint in closing argument, and the
13 other side objected that it had a slide referring to facts
14 not in evidence. And it became clear, based on my judgment,
15 that it wasn't -- it was, in fact, a fact not in evidence,
16 and I struck it in the middle of his close.

17 To his credit, he did a fine job of, like, managing
18 to have the PowerPoint pulled out from under the rug. And
19 the technical person did a really good job. And further into
20 the closing he was able to use it without the one or two
21 slides that had the facts not in evidence.

22 So I'm not saying you have to do that, at all. You
23 don't have to show it to the other side. I just -- you can
24 think about that, because it mitigates issues. But there's
25 no rule that you have to. It just means that if you don't,

1 and then there's an issue, then there's an issue.

2 I'm not saying -- it's unusual. I prefer not to
3 have to do that. I don't say that as that that's in
4 my mind. My happiest moments in openings and closings are
5 when it all goes smoothly and there's no objections. Or if
6 there are, they are the kind of things that I can resolve
7 after. So but there's no general reason that you can't use a
8 PowerPoint.

9 Do you all want to use JERS?

10 MR. FRANK: I mean, we'll prepare a JERS disc.
11 We -- I frankly don't have much experience with how it
12 actually functions back there. But we have no objection to
13 preparing a disc.

14 THE COURT: Nor do I. But I -- so we might --
15 maybe we'll do that. But -- I'm not sure if the testimony --
16 we're having a problem with it. I'll look into it.

17 Any other housekeeping -- any matters that you all
18 want to address with me, that we can take up probably not
19 now, but tomorrow or Friday?

20 MR. WEINBERG: Not right now, Your Honor.

21 THE COURT: So if I wanted to talk to you more
22 about the DPA thing, should we do that Friday at 2 o'clock or
23 just do that Monday after we're done picking the jury?

24 MR. WEINBERG: Whichever Your Honor prefers.

25 THE COURT: Why don't we just do it Monday after we

1 pick the jury. We can do it Monday afternoon.

2 MR. FRANK: That's fine, Your Honor. There's a
3 whole other reason why we think the DPA may need to come in,
4 and that's related to our motion to preclude the evidence of
5 State Street executives' reactions in September after parts
6 of the fraud began to emerge.

7 THE COURT: All right. Maybe we can talk about
8 that then, too.

9 Okay. All right. Then that's it, unless you have
10 anything else? No.

11 MR. FRANK: No, Your Honor. Thank you.

12 MR. WEINBERG: Thank you, Your Honor.

13 THE COURT: Thank you very much.

14 THE DEPUTY CLERK: All rise. This matter is
15 adjourned.

16 THE COURT: One last thing, just for you, Mr. Frank
17 and Mr. Johnston, not necessarily right now, not necessarily
18 before Monday. Mr. Weinberg filed some objections to your
19 jury instructions, not quite as to all those things, but to
20 some of those things. They raised issues as to -- they're
21 the mirror of how his proposal differed from yours, and his
22 added or had different takes on certain issues than yours.
23 I'm sure you have seen that or will see that. Some of those
24 issues are issues that I'd be interested in hearing the
25 Government's response to.

1 Whether I should issue a willful blindness
2 instruction or not, I don't need briefing from you now.
3 That's an issue that, if you want to brief, would be at the
4 very end. Or I would just hear from you why you think the
5 evidence shows that it's warranted in this particular case.

6 On the other hand, some of them about in
7 connection, and the like, are more complicated legal
8 questions. And this is a case where I'm thinking about
9 writing the jury instruction -- well, notwithstanding the
10 fact that some of your colleagues weren't happy that I tried
11 to be prepared in another case by writing the jury
12 instructions in a tentative fashion before the trial began
13 and then sharing with them, so they would know what I was
14 thinking about. I'm, nonetheless, not deterred in
15 preparation and think that preparation is a valuable thing.

16 So in this case, I'm not that prepared, but I am
17 thinking about the jury instructions. And so there's no
18 particular time at the moment. I'm not dealing with that in
19 any meaningful way before Monday or Tuesday. But it would be
20 helpful on some of those, because they are more nuanced
21 issues that are not so straightforward. And I'd be
22 interested in that, because I am going to try to think about
23 that as we go along; so that when we get to the end, I've
24 thought that through, and then I can hear from you and I have
25 really looked at that and resolved it.

1 MR. FRANK: We will do that, Your Honor.

2 THE COURT: Okay. Thanks.

3 THE DEPUTY CLERK: This matter is adjourned.

4 (Court in recess at 3:48 p.m.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF OFFICIAL REPORTER

I, Rachel M. Lopez, Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 7th day of January, 2019.

/s/ RACHEL M. LOPEZ

Rachel M. Lopez, CRR
Official Court Reporter